

APPEAL NO. 020919
FILED MAY 20, 2002

Following a contested case hearing held on March 19, 2002, pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act), the hearing officer resolved the disputed issues by determining that the appellant/cross-respondent's (claimant) compensable injury of _____, does extend to and include erectile dysfunction (ED) and that the claimant's average weekly wage (AWW) is \$710.98. The claimant has requested review of the AWW determination, contending that because he historically has earned much more money in the fall from overtime for scheduled maintenance, the hearing officer should have used the fair, just, and reasonable method of determining his AWW rather than basing his AWW on the 13-week period preceding the date of injury. The respondent/cross-appellant (carrier) has requested review of the extent-of-injury determination on evidentiary sufficiency grounds. Both parties filed responses.

DECISION

Affirmed.

The claimant testified that his low back was injured at work on _____; that he subsequently experienced not only low back pain but also groin and testicular pain; that during the summer of 2000 he began to experience ED; and that his treating doctor, Dr. H, has told him this condition is caused by nerve damage resulting from his lumbar spine injury. Dr. H wrote on October 16, 2001, that "[ED] can develop from this type of injury" and that it is his opinion that "this is related to the low back injury which occurred on _____." Dr. JC wrote on November 15, 2001, that the claimant's ED "very well could be discogenic in nature and hopefully will improve following surgery." Dr. WC wrote on December 5, 2001, that, referring to the claimant's back injury and ED, he felt "[t]he cause/effect relation seems to be fairly obvious to me." The carrier introduced the written reports of several doctors who reviewed the claimant's medical records and opined to the contrary on the cause of the ED. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the hearing officer's determination that the claimant's injury of _____, extends to and includes his ED is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951); Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

As for the AWW issue, the hearing officer found that the claimant's earnings during the 13 consecutive weeks immediately preceding his compensable injury were \$9,242.70 and that his AWW is \$710.98. The claimant does not challenge the accuracy of these

figures. Rather, he contends, the hearing officer should have used a "fair, just, and reasonable" method of calculating his AWW, as provided for in Section 408.041(c), and he asked the hearing officer to consider the full year of his earnings preceding the date of injury rather than considering only his earnings during the 13-week period preceding the injury, as provided for in Section 408.041(a). Section 408.041(a) provides that the AWW for an employee who has worked for the employer for at least the 13-week period immediately preceding the injury shall be the sum of those wages divided by 13. Section 408.041(c) provides, in part, that if subsection (a) and subsection (b), which is not applicable here, "cannot be reasonably be applied" because the employment has been irregular or because there was lost time in the 13 weeks preceding the injury because of "weather, or another cause beyond the control of the employee," then the AWW may be determined by any method considered "fair, just, and reasonable to all parties"

The claimant contends that, historically, he always worked more overtime in the fall season because power outages for maintenance are scheduled at that time for several weeks whereas the power outages during the remainder of the year resulting in overtime work are nonscheduled emergencies. He compared this seasonal fluctuation in his earnings with the "irregular employment" countenanced in Section 408.041(c) but did not contend that he was a seasonal worker (Section 408.043). The claimant's Employer's Wage Statement (TWCC-3) reflected that during the 13-week period preceding this date of injury, he was off work one week without pay and his hours for full weeks varied from 28 to 68.5. In Texas Workers' Compensation Commission Appeal No. 982734, decided January 4, 1999, the Appeals Panel stated that Section 408.041(c) is to be used to determine AWW when the actual wages are not representative of the employee's "true earnings" due to factors beyond the employee's control. In Texas Workers' Compensation Commission Appeal No. 971239, decided August 15, 1997, the Appeals Panel affirmed a hearing officer's decision to base an employee's AWW on the actual 13 weeks of earnings provided for in Section 408.041(a) rather than a "fair, just, and reasonable method" provided for in Section 408.041(c) where the evidence showed that the employee's actual hours were "variable as a normal course of business." We do not find legal error in the hearing officer's calculating the claimant's AWW pursuant to Section 408.041(a) rather than Section 408.041(c) and we are satisfied that the hearing officer's factual determination of the claimant's AWW is sufficiently supported by the evidence.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **CONTINENTAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL
DALLAS, TEXAS 75201.**

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge